COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

14-P-1937

NEW BEDFORD AIRPORT COMMISSION[1]

vs.

CIVIL SERVICE COMMISSION & another[2].[3]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant Anthony Moniz was discharged from his position as a diesel engine repair person at the New Bedford (city) airport. Moniz appealed the discharge to the Civil Service Commission (commission), which ruled that there was just cause for discipline, but modified the penalty to a twenty-one month suspension. The appointing authority appealed, and a judge of the Superior Court vacated the commission's decision. On appeal, there is no challenge to the commission's conclusion that there was just cause for discipline, and the record amply demonstrates the basis for the discipline. Instead, Moniz

[1] Acting by and through its manager, Thomas Vick.

[2] Anthony Moniz.

[3] Although our custom is to take the names of the parties as they appear in the complaint, as a copy of the Superior Court complaint was not included in the appendix, we use the names that appear in the Superior Court judgment.

contends that the judge erred by impermissibly substituting his judgment for that of the commission with respect to the modification of the penalty. We vacate the judgment, but remand the case to the commission for further proceedings, because the commission's decision, as to the modified penalty only, was based in part on unsupported and incomplete factual findings.

Background. We summarize the procedural history and the facts found by the commission. Moniz has worked for the city since the fall of 1996. He received satisfactory performance reviews between 1997 and 2010, but he also had a significant history of discipline while working for the city's department of public facilities.[4] He was involuntarily transferred to the city airport on July 3, 2011.

[4] In March of 1999, the city charged Moniz with using city equipment to remove tree stumps from his private property during working hours. Although the city contemplated termination, it ultimately levied a seventeen-day suspension, and Moniz signed a "last chance agreement." Over the next decade, the city suspended Moniz once and gave him multiple warnings for other infractions, but did not invoke the last chance agreement. Moniz received a written warning in 2002 for refusing an assignment and going home sick. He received a written warning for failing to report to a snow emergency in 2006. He received a one-day suspension in 2010 for absenteeism. In March of 2011 he was warned regarding compliance with the city's anti-discriminatory harassment policy following an incident where he drove to a coworker's house and allegedly stared at his sister-in-law. In April of 2011, his comment that he would like to "bash his [coworker's] head in" prompted a verbal warning. Written warnings are not appealable to the commission, see G. L. c. 31, § 41, and the parties represented to the commission and to us that they are not grievable.

1. Discipline and termination. Conflict emerged between Moniz and his supervisor, Thomas Vick, airport manager, within weeks of the transfer. On September 14, 2011, Vick gave Moniz a written warning for insubordination (failing to wear his assigned uniform) and failure to complete assigned tasks (work logs and paint snow equipment). Moniz refused to sign the warning and threw it back at Vick. No action was taken by Vick at that time, but on September 20, 2011, Vick had an encounter with Moniz which Vick claimed was hostile and threatening.[5]

On September 21, 2011, Moniz was suspended pending a hearing on his termination. After a hearing before Vick, Moniz was terminated on September 28, 2011. By letter of even date, Vick gave eight reasons for the termination: (1) creating a hostile and intimidating work environment for his supervisor (Vick) and creating a perceived threat to harm him by stalking, all in violation of the city's "Notice to Employees about Workplace and Domestic Violence" (policy) on September 20, 2011; (2) creating a hostile and intimidating work environment "as carrying a potential for physical and/or psychological harm" on September 20, 2011, in violation of the city's policy; (3)

[5] According to Vick, Moniz was in an office with the manager of the restaurant and some contractors when Vick approached. After Moniz noticed Vick, Moniz walked to the doorway and stood with his arms crossed, glaring at Vick. When Vick said "good afternoon," Moniz did not respond, his body became more rigid, and he squinted harder as he continued to watch Vick.

creating a hostile and intimidating work environment that could be perceived as "menacing" on September 13, 19, and 20, 2011, in violation of the city's policy; (4) "failing to perform [his] duties, including during the weeks of August 28 and September 6, 2011"; (5) insubordination on September 14, 15, and 19, 2011; (6) falsification of work records on September 14 and 19, 2011; (7) "substandard work in [his] job requirements, including during the weeks of August 28 and September 6, 2011"; and (8) inability to account for work time on three occasions in August and September of 2011.

The first three charges involved alleged violations of the city's policy, which the city said were based on events occurring on September 13, 19, and 20, 2011. Vick stated in a contemporaneous report that Moniz attempted to provoke Vick on September 19, and that on September 20, Moniz crossed his arms and glared at Vick, behavior the city described as "stalking" and which Vick stated placed him in fear of physical violence.

The remaining charges, which were based on a multitude of incidents, included failure to complete assignments, failure to paint snow equipment as directed, failure to maintain the airport generators as directed, deliberate falsification or neglect of time records and employee logs, unaccounted-for absences during working hours, a continuing refusal to wear a

uniform despite specific orders to do so, and generally acting in a disrespectful and insubordinate manner towards Vick.

2. Commission decision and modification of penalty. The commission took evidence on all the charges.[6] The commission found that the city failed to meet its burden to prove harassment and intimidation in violation of its policy, allegations which the city emphasized at the hearing. The commission did not credit Vick's testimony that he had been placed in fear, stating that he "exaggerated the situation" and "unreasonably interpreted Moniz's facial expression." The commission further found that "Moniz did not try to intimidate or threaten Vick." The commission also found that although Moniz "guessed" on his daily logs, "there was no persuasive evidence that he did not perform the tasks he described or intentionally falsified any entries," that Moniz's log was filled out in much the same way as other employees' logs, and that the city had also failed to establish just cause for the termination on this basis.[7]

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[6] An employee discharged for just cause may appeal to the commission. See G. L. c. 31, § 2(b). The commission conducts a de novo hearing for the purpose of fact finding. Falmouth v. Civil Serv. Commn., 447 Mass. 814, 823 (2006).

[7] The commission found that there was "no exact or consistent way in which [daily] activit[y] logs were supposed to be completed by employees," that the "daily activity logs submitted by most employees are not detailed enough to identify the exact time and exact location of an employee at any given time," and that Vick told "Moniz when he transferred to the airport job that Moniz

However, the commission also found that Moniz had been insubordinate in wearing T-shirts rather than the approved uniform, and concluded that Moniz ultimately had shirked his responsibilities in completing the assignment to paint the snow removal equipment in September of 2011.[8] The commission found that Moniz had spoken disrespectfully to and about Vick (asking one employee if she had heard about how he had "pissed off 'Chiefie'"),[9] had thrown the September 14 written warning at Vick, and that Moniz's actions "carr[ied] a thread of an insubordinate spirit that cannot be tolerated in the public service."

Finally, the commission found that Moniz had neglected two airport generators, which he was charged with maintaining, during the weeks of August 28 and September 6, the two-week period after Hurricane Irene. One of these generators maintained the emergency airfield lights on the runway; the other was the backup generator for the tower.[10] A majority of

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would not need to submit daily activity sheets prior to August 1, 2011."

[8] The commission found that there had been an initial miscommunication concerning what equipment to paint, but that Moniz failed to paint the equipment even after the order had been clarified.

[9] Moniz makes no claim that this remark constituted protected concerted activity. See Plymouth Police Bhd. v. Labor Relations Commn., 417 Mass. 436 (1994).

[10] Moniz was required to maintain and, when necessary, repair the airport's generators. According to Vick, if a plane were to attempt to land without proper lighting in bad weather, it would

the commissioners found that "[a]lthough the delay in attending to the generator was not entirely attributable to Moniz and did not result in any operational problems, it was a priority matter that Moniz had responsibility to address."[11] The commission majority concluded that because the failure to maintain the generators could have had serious consequences, significant discipline was warranted both for the failure to maintain the generators and for the ongoing pattern of insubordination.

Based on these findings, a majority of the commissioners concluded that a reduction in discipline was warranted and imposed a twenty-one month suspension. The majority's rationale was that the most serious charge was unproven, the city "had consistently treated [Moniz's] behavior as warranting only warnings, up to and including his last written warning of September 14, 2011," and the city had not imposed "any more significant progressive discipline beyond a warning since 1999 for any of Moniz's subsequent offenses." Two dissenting

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"conceivably [be] a life-and-death situation." After Hurricane Irene struck in late August, the generators were not checked for two weeks. When they were checked, an alarm was ringing and the generator emitted a strong odor.

[11] Vick would not permit Moniz to drive to the generators without additional training on runway safety practices, but had decided that Moniz should have more on-the-job experience before he completed that portion of his training. For that reason, Moniz had to be driven to the generators by others. While this was an inconvenience, the commission found that it was Moniz's responsibility to arrange for transportation so that he could fulfill his responsibilities.

commissioners did not take issue with the facts found, but were "hard pressed to understand how anything less than termination [was] warranted for . . . refusing to wear the proper uniform while on duty . . ., failing to satisfactorily complete an assignment[,] and failing to properly maintain generators at the airport," as well as insubordination. The two dissenting members concluded that the decision to terminate employment was justified.

The city filed a motion for reconsideration. For the first time, the city explicitly argued public safety, stating that maintaining the generators was an essential function of the job, and that Moniz's lack of reliability "is unacceptable at an airport, where public safety demands that airport facilities and equipment be properly maintained." The motion was denied.

3. Superior Court action. A judge of the Superior Court vacated the commission's decision and reinstated the termination. The judge relied on Moniz's long history of discipline, the more recent acts of insubordination, and the importance of safety and attention to detail in a job at the airport. The judge reasoned that "[the commission] did not make any finding that the decision of the [city] was motivated by political pressure, bias or favoritism. In substance, they have chosen to substitute their judgment for that of the [c]ity."

Discussion. 1. Notice. Moniz contends that the commission and the judge erred in considering matters of public safety because no reference to public safety was made in the letter of charges dated September 21, 2011, or the termination letter dated September 28, 2011. "[T]he appointing authority can rely only on those reasons for [its action] that it gave to the employee in writing . . . ." Gloucester v. Civil Serv. Commn., 408 Mass. 292, 297 (1990). See G. L. c. 31, § 41, inserted by St. 1978, c. 393, § 11 ("Before [the disciplinary] action is taken, [an] employee shall be given a written notice . . . includ[ing] . . . the specific reason or reasons for such action . . . and shall be given a full hearing concerning such reason or reasons before the appointing authority . . ."). Likewise, "a decision of the commission is not justified if it is not based on the reasons specified in the charges brought by the appointing authority." Murray v. Justices of the Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 516 (1983). See Mayor of Somerville v. District Ct. of Somerville, 317 Mass. 106, 113 (1944).

As a matter of emphasis, the argument is not wholly without force. The city did not explicitly argue public safety until after the commission's decision. As a matter of notice, however, the September 21, 2011, letter gave Moniz adequate notice that maintenance of the generators was one of the grounds

for his termination. The word "safety" was not used in the September 21, 2011, letter, but the letter did reference substandard work performance during the relevant time period.[12] The appointing authority was permitted to rely on the failure to maintain the generators as a ground for termination. The commission and the judge did not err by considering the public safety consequences of the failure to repair the generators.

2. Penalty. On appeal, Moniz does not challenge the commission's conclusion that there was just cause for discipline, and we find no error in that conclusion. His sole claim of error is based on the judge's decision to vacate the commission's modification of the penalty.

Our review is guided by the statutory scheme. A tenured civil service employee may not be discharged without "just cause." G. L. c. 31, § 41, inserted by St. 1978, c. 393, § 11. The meaning of just cause must be construed in a manner which conforms to the purpose of the civil service legislation, namely, "to free public servants from political pressure and arbitrary separation . . . but not to prevent the removal of those who have proved to be incompetent or unworthy to continue in the public service." School Comm. of Brockton v. Civil Serv.

[12] In the September 28, 2011, termination letter, Vick made specific reference to poor performance during the time period when the generators were not repaired, and both parties elicited testimony concerning the maintenance of the generators at the commission hearing.

Commn., 43 Mass. App. Ct. 486, 488 (1997) (quotation omitted). To that end, "the appropriate inquiry is whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." Ibid., quoting from Murray v. Justices of Second Dist. Ct. of E. Middlesex, 389 Mass. at 514.

The commission conducts a de novo review of the facts. Falmouth v. Civil Serv. Commn., 447 Mass. 814, 823 (2006). The commission must determine whether "there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision." Id. at 824, quoting from Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). See G. L. c. 31, § 43. In performing this function, "the question is not whether [the commission] would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority." Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003) (quotation omitted). If just cause for a discharge exists, "[the commission] shall affirm the action of the appointing authority." G. L. c. 31, § 43, as appearing in St. 1981, c. 767, § 20.

The commission may also modify the penalty imposed by the appointing authority, G. L. c. 31, § 43, although that authority is not without limits. In cases where the commission's factual findings are functionally the same as those of the appointing authority, and in the absence of political considerations, favoritism, bias, or differing interpretations of relevant law, the same discipline is warranted. Falmouth v. Civil Serv. Commn., supra at 824 (inconsequential distinction in fact finding leaving nature and gravamen of violations intact). Nevertheless, if the commission's factual findings differ substantially, the commission has considerable discretion to modify a penalty. See Faria v. Third Bristol Div. of the Dist. Ct. Dept., 14 Mass. App. Ct. 985, 986 (1982); Police Commr. of Boston v. Civil Serv. Commn., 39 Mass. App. Ct. 594, 600 (1996).

Here, the commission's factual findings were materially different than those of the appointing authority on a matter that was not inconsequential. Contrast Falmouth v. Civil Serv. Commn., supra at 823-827. The judge did not acknowledge the factual differences between the findings of the city and those of the commission, and instead erred by concluding that the commission had simply substituted its judgment for that of the city. See McIsaac v. Civil Serv. Commn., 38 Mass. App. Ct. 473,

476 (1995) (court must not "substitute its judgment on questions of fact or exercise of discretion").[13]

The city claims that the commission's decision was nonetheless arbitrary and capricious. See G. L. c. 30A, § 14(7)(g). "A decision is arbitrary and capricious when it lacks any rational explanation that reasonable persons might support." Cambridge v. Civil Serv. Commn., 43 Mass. App. Ct. 300, 303 (1997). Given the commission's findings that Vick's claims of intimidation were not credible, and its additional finding that Moniz did not falsify records or generally shirk his duties,[14] the decision to modify the penalty did not lack a rational explanation.

The judge also concluded that the commission's decision was in error because the commission did not make a finding that the city's decision was motivated by political pressure, bias, or favoritism. Actual bias or favoritism is one basis upon which the commission may modify a penalty, but a factual finding of explicit bias is not required where, as here, the factual findings of the commission differ from those on which the

[13] In summarizing the facts of the case, the judge also recited facts regarding Moniz's methods of filling out timesheets, and his delay in returning from a trip to make a work-related purchase that corresponded to the city's proposed facts, but which differed materially from those found by the commission. See, e.g., note 7, supra. This too was error, for the judge may not find facts "afresh." Leominster v. Stratton, supra at 726.

[14] The city makes no argument on appeal that these factual findings are unsupported.

penalty was based. See Falmouth v. Civil Serv. Commn., 447 Mass. at 824.

Even though the judgment must be reversed, the commission's decision cannot be sustained. In modifying the penalty, the commission relied on its view that the city had violated the norms of progressive discipline, because it had not imposed any discipline more significant than a written warning since 1999.[15] The commission's reliance on its assertion that the city had not imposed any discipline more significant than a written warning since 1999 is contradicted by the commission's express finding that Moniz was suspended for one day in December, 2010, for not showing up for work. For this reason, the decision of the commission must be vacated and the case remanded for consideration anew of the propriety of the penalty.

Moreover, the commission majority's decision was predicated, at least in part, on the premise that the city was unwarranted in terminating Moniz because it had issued no more than a written warning on September 14, 2011. The commission majority concluded that insufficient additional grounds for termination were presented, once the commission found that Moniz had not threatened Vick, a charge which the majority described

[15] The city did not invoke its rights under the last chance provision of the suspension on any occasion since 1999. The record is silent as to the reason why.

as "the most serious charge against him."[16] The commission found that the September 14, 2011, warning was for failing to wear the uniform, failing to complete the logs, and failing to paint the snow equipment, but the commission made no findings as to whether Vick knew about the generators at the time he issued the warning. That is, the decision is unclear as to whether Vick knew about the failure to maintain the generators, but chose not to include the generators in the warning, or whether Vick learned of the failure to maintain the generators after the warning had been given. This omission is material to judicial review of the commission's decision to reduce the penalty.

When faced with a decision based on findings supported by the evidence, the court's role is limited to the narrow question whether the commission's decision was "legally tenable." Leominster v. Stratton, 58 Mass. App. Ct. at 728. Such a narrow review "accord[s] due deference and weight not only to the commission's 'experience, technical competence, and specialized knowledge' but also 'to the discretionary authority conferred upon it.'" Thomas v. Civil Serv. Commn., 48 Mass. App. Ct. 446, 451 (2000), quoting from School Comm. of Brockton v. Civil Serv.

[16] The commission ruled that the "most serious charge" against Moniz "was not proved," and that "[t]he other charges of misconduct and substandard performance, standing alone or in combination, most of which pre-dated his written warning, do not justify his termination."

Commn., 43 Mass. App. Ct. at 490, quoting from G. L. c. 30A, § 14(7).

The current decision is not legally tenable. Where, as here, facts material to the decision-making process are either unsupported or "[in]adequate to support meaningful judicial review," NSTAR Elec. Co. v. Department of Pub. Util., 462 Mass. 381, 397 (2012), remand is warranted. See, e.g., Faria v. Third Bristol Div. of the Dist. Ct. Dept., 14 Mass. App. Ct. at 986-987. Because fact finding and discretion are vested first in the commission, and not the court, the commission must address these factual anomalies. We express no opinion as to the facts or their consequences.

Conclusion. The commission's reduction in penalty was based in part on a finding regarding the use of progressive discipline unsupported by the record, and in part on a failure to make findings "adequate to support meaningful judicial review." NSTAR Elec. Co. v. Department of Pub. Util., supra. On further consideration, the commission must reexamine whether there is any basis for a modification of the decision to discharge Moniz. Accordingly, the judgment is reversed, and a new judgment is to enter vacating the decision of the commission

and remanding the case to the commission for further proceedings consistent with this memorandum and order.

So ordered.

By the Court (Agnes, Sullivan & Blake, JJ.[17]),

Joseph F. Stanton

Clerk

Entered: June 8, 2016.

[17] The panelists are listed in order of seniority.